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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 VAN PHILLIPS) Case No. C073305 SI
Plaintiff,)
12 -v-)
13) **FIRST AMENDED COMPLAINT**
14) **FOR FRAUD, BREACH OF**
JOHN D. DIAMOND, DIAMOND) **CONTRACT, CONVERSION,**
15 PHILLIPS, INCORPORATED, an Illinois) **COMMON LAW ACCOUNTING,**
Corporation, AND DOES 1 THROUGH) **AND UNJUST ENRICHMENT**
16 50, INCLUSIVE)
(DEMAND FOR JURY TRIAL)
17 Defendants.)
18)
19)
20)

21 1. Plaintiff, Van Phillips, is and was at all times mentioned herein, a citizen of the
22 State of California in the County of Mendocino.

23 2. Defendant John D. Diamond is and was at all times mentioned herein a citizen
24 of the State of Utah.

25 3. Defendant Diamond Phillips, Incorporated is a corporation incorporated under
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1 the laws of the State of Illinois, having its principal place of business in the State of Utah.

2 4. Venue is proper in this Court, as Plaintiff resides in this district and the claim
3 arose in this district.
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5 5. Plaintiff hired the Defendants herein to provide architectural, engineering and
6 interior design services for several construction projects situated on real property owned by
7 Plaintiff. Defendants were to provide architectural, engineering and interior design work
8 product (collectively, "Work Product") for Plaintiff's projects.

9 6. These construction projects (collectively referred to as "Projects"), all located in
10 California, are more specifically described as: the Farmhouse on Navarro Ridge Road in
11 Albion; Sausalito Guest House and Sausalito Main House on San Carlos Avenue in the City of
12 Sausalito; the Green House located in Mendocino; the Tea House in Albion, Stillwell Point
13 (also known as Buckhorn Cove); The Ropes in the City of Little River; Old Fellows Hall on
14 Ukiah Street in Mendocino; and the Gray House on Navarro Ridge Road in Albion.
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16 7. In late 2004, early 2005, Defendants represented to Plaintiff that he could
17 provide doors and windows for Plaintiff's various Projects at cost. Defendants claimed that he
18 could get the doors and windows through Contractors Window Supply (CWS) in Utah and that
19 Plaintiff would not have to pay California sales tax. Later on, Defendants made repeated
20 statements to Plaintiff that he had saved and was saving Plaintiff a considerable amount of
21 money by purchasing the doors and windows for him through CWS. These representations
22 were false.
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24 8. Defendants herein ordered construction materials for the Projects described
25 above. Those construction materials included, but are not limited to, windows, doors,
26 plumbing fixtures and appliances (herein after collectively referred to as "Construction
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1 Materials.”) Defendants never ordered or delivered the plumbing fixtures and appliances to
2 the Plaintiff. Defendants invoiced Plaintiff for the doors and windows in amounts which were
3 above the cost charged to the Defendants. Plaintiff paid the majority of these invoices. Just
4 recently, Defendants have submitted Diamond Phillips invoices to Plaintiff which contain
5 surcharges and Utah sales tax for the doors and windows ordered through CWS. These
6 surcharges and taxes, which do not appear on any CWS invoices, were never agreed to and
7 were never disclosed at the time of the oral agreement. In fact, these surcharges and taxes were
8 not included in the original Diamond Phillips invoices that Plaintiff paid in full. Rather, they
9 appeared on summary statements submitted to Plaintiff a year and a half after the original
10 Diamond Phillips invoices.
11

12 9. Defendants charged Plaintiff for large amounts of doors and windows that are
13 being stored in a Utah warehouse owned by a third party. In addition, Plaintiff has no
14 knowledge of where the plumbing fixtures and appliances are being kept, if they exist.
15 Because these Construction Materials are not in Plaintiff’s custody or control, he is unaware of
16 the exact quantity and value of Construction Materials that are being stored in Utah.
17

18 10. To date, Defendants failed to provide sufficient documentation by way of
19 purchase orders, work orders, invoices, receipts, etc. to determine what Construction Materials
20 were purchased and for how much. Defendants did this to conceal the fraud of overcharging
21 Plaintiff for the Construction Materials.
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23 11. Defendants have also failed to produce all Work Product that Plaintiff paid for
24 in full. Consequently, it is unclear how much work, if any, the Defendants performed as to
25 each Project.
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First Count

(Against JOHN D. DIAMOND, DIAMOND PHILLIPS, INCORPORATED
AND DOES 1 THROUGH 50, INCLUSIVE)

14. Defendants promised Plaintiff that they would provide Construction Materials for Plaintiff at cost. Defendants led Plaintiff to believe that he would only have to pay the cost price of the Construction Materials with no mark up. Defendants also told Plaintiff that if they provided the doors and windows (through CWS) Plaintiff would avoid paying the marked-up price of the doors and windows if he purchased them through a contractor. Defendants continually reinforced this false promise by telling Plaintiff on several occasions that they were saving him money. In addition, Defendants promised they would provide the Work Product for Plaintiff's Projects. These promises were important to the transaction. Plaintiff relied on Defendants' promises.

15. Defendants did not intend to perform these promises when they made them. Defendants intended that Plaintiff rely on these promises. Plaintiff reasonably relied on these promises and agreed to hire Defendants to provide the Work Product and order the Construction Materials. Defendants did not perform the promised acts.

18. By reason of the foregoing, Defendants acted with malice, fraud and/or oppression and as such, Plaintiff is entitled to an award of punitive damages in a sum according to proof at trial.

BREACH OF ORAL CONTRACT

20. Plaintiff and Defendants entered into an oral contract whereby Defendants agreed to provide architectural and engineering services and Work Product in exchange for

1 money. In addition, Defendants agreed to order Construction Materials for Plaintiff.
2 Defendants agreed to provide the doors and windows to Plaintiff at cost.

3 21. Plaintiff did all, or substantially all of the significant things that the contract
4 required him to do. That is, Plaintiff paid for the services, Work Product and Construction
5 Materials. As such, all conditions required for Defendant's performance had occurred.
6

7 22. Defendants failed to perform the services under the oral agreement by failing to
8 produce the Work Product paid for, failing to order certain Construction Materials and failing
9 to provide the doors and windows ordered at cost. As a result of that failure, Plaintiff was
10 harmed in an amount to be proven at the time of trial.
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13 Third Count

14 **CONVERSION**

15 (Against JOHN D. DIAMOND, DIAMOND PHILLIPS, INCORPORATED
16 AND DOES 1 THROUGH 50, INCLUSIVE)

17 23. Plaintiff realleges and incorporates by reference each and every allegation of the
18 above paragraphs 1 through 12, 14 through 18, and 20 through 22 inclusive, as if fully set forth
19 herein.

20 24. Plaintiff owned and had a right to possess all the Work Product and
21 Construction Materials that he paid for. In some instances, Plaintiff paid Defendants for Work
22 Product that was never completed and for Construction Materials that were never ordered.
23 Thus, Defendants wrongfully converted Plaintiff's money for their own benefit for long periods
24 of time.
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26. In addition, Plaintiff did not consent to these acts. As a result, Plaintiff was harmed, suffering damages in an amount to be proven at the time of trial. Further, Defendants' conduct was a substantial factor in causing Plaintiff's harm.

27. By reason of the foregoing, Defendants acted with malice, fraud and/or oppression and as such, Plaintiff is entitled to an award of punitive damages in a sum according to proof at trial.

COMMON LAW ACCOUNTING

28. Plaintiff realleges and incorporates by reference each and every allegation of the above paragraphs 1 through 12, 14 through 18, 20 through 22, and 24 through 27, inclusive, as if fully set forth herein.

29. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, are fiduciaries of Plaintiff herein, as Defendants are in a position of trust and confidence upon which Plaintiff reasonably relied. Plaintiff reasonably relied upon Defendants professional expertise and paid Defendants for Work Product and Construction Materials that were supposed to be appropriate and necessary for the Projects.

30. Plaintiff is informed and believes and thereon alleges that, due to Defendants failure to account for the Work Product and Construction Materials paid for by Plaintiff,

1 Defendants owe Plaintiff money in an amount that Plaintiff is ignorant of and that can only be
2 ascertained through an accounting.

3 31. Additionally, Plaintiff is not in possession of the allegedly ordered Construction
4 Materials and allegedly performed Work Product which Plaintiff paid for, and as a result, it is
5 necessary to compel the Defendants to account for said property. The Construction Materials
6 and are not in Plaintiff's possession or control and Plaintiff alleges that not all Work Product
7 was provided to him for which he paid.

8 32. In order to determine the amount that Defendants owe to Plaintiff money for
9 Construction Materials not purchased or Work Product never produced, an accounting of
10 money and property is necessary.

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13 Fifth Count

14 **UNJUST ENRICHMENT**

15 (Against JOHN D. DIAMOND, DIAMOND PHILLIPS, INCORPORATED
16 AND DOES 1 THROUGH 50, INCLUSIVE)

17 33. Plaintiff realleges and incorporates by reference each and every allegation of the
18 above paragraphs 1 through 12, 14 through 18, 20 through 22, 24 through 27, and 29 through
19 32, inclusive, as if fully set forth herein.

20 34. Plaintiff is informed and believes and thereon alleges that Defendants
21 overcharged Plaintiff for the Construction Materials. In addition, Plaintiff alleges that
22 Defendants charged Plaintiff for Construction Materials that were never purchased. Similarly,
23 Defendants charged Plaintiff for Work Product that was never done or provided to Plaintiff.

24 35. Plaintiff further alleges that Defendants have been unjustly enriched as they
25 improperly obtained a financial benefit from Plaintiff's payments for said Construction
26 Materials and Work Product. Defendants have knowledge of the benefit conferred upon them
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1 by Plaintiff. Defendants' acceptance and retention of the monetary benefit under the
2 circumstances makes it inequitable for the Defendants to retain that benefit.

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4 36. Accordingly, Plaintiff seeks restitution against Defendants for the recovery of
5 those ill-gotten gains in an amount to be proven at trial.

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7 WHEREFORE, Plaintiff prays judgment as follows:
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9 ON THE FIRST COUNT

- 10 1. Compensatory damages according to proof;
11 2. Consequential damages according to proof;
12 3. Prejudgment interest on damages according to proof; and
13 4. Punitive damages.
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15 ON THE SECOND COUNT

- 16 1. For compensatory damages according to proof;
17 2. For consequential damages according to proof;
18 3. For prejudgment interest on damages according to proof; and
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20 ON THE THIRD COUNT:

- 21 1. Compensatory damages according to proof;
22 2. Consequential damages according to proof;
23 3. Prejudgment interest on damages according to proof; and
24 4. Punitive damages.
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1 ON THE FOURTH COUNT:

- 2 1. For an accounting of monies owed;
- 3 2. For an accounting of property paid for by the Plaintiff;
- 4 3. For a judgment against Defendants John D. Diamond, Diamond Phillips,
- 5 Incorporated and Does 1 through 50 inclusive, for monies owed to the Plaintiff
- 6 in an amount to be proven at trial.
- 7 4. For costs of suit.
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10 ON THE FIFTH COUNT:

- 11 1. For restitution for ill-gotten gains for Construction Materials and Work Product
- 12 paid for by Plaintiff in an amount to be proven at trial.
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- 14 2. For costs of suit.
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16 ON ALL COUNTS:

- 17 1. For such other relief that the court considers just and proper.
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20 Dated: September 27, 2007

/s/ John W. Howard

21 John W. Howard
22 Attorney for Plaintiff

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the *Federal Rules of Civil Procedure*.

/s/ John W. Howard

John W. Howard
Attorney for Plaintiff